

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

THE FLAG CO.,
Plaintiff,
v.
BILL MAYNARD, STEVE ADAMS,
and RONALD THOMAS a/k/a/
RONALD ROTHSTEIN,
Defendants.

No. CV-05-1194-HU

FINDINGS & RECOMMENDATION

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1 - FINDINGS & RECOMMENDATION

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HUBEL, Magistrate Judge:

Plaintiff The Flag Company brings this action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, against defendants Bill Maynard, Steve Adams, and Ronald Thomas a/k/a Ronald Rothstein¹. Plaintiff moves to strike the affirmative defenses pleaded by Maynard and Adams in their Answers to plaintiff's Second Amended Complaint. I recommend that the motion be granted ~~IN DISCUSSION~~ and denied in part.

Plaintiff brings two RICO claims: one under 18 U.S.C. § 1962(c) and the other under 18 U.S.C. § 1962(d). Plaintiff alleges that defendants conspired to induce it to purchase "blast faxing" services through fraudulent interstate wire transmissions. Plaintiff defines "blast faxing" as the sending of large numbers of unsolicited facsimile advertisements to potential customers throughout the nation. Sec. Am. Compl. at ¶ 2. Plaintiff contends that as an integral part of the scheme perpetrated by defendants,

¹ For ease of reference, I refer to this defendant simply as Rothstein.

1 defendants omit to inform their "victims" that sending unsolicited
2 fax advertisements violates the federal Telephone Consumer
3 Protection Act (TCPA), 47 U.S.C. § 227, which can subject the
4 victim to a \$500 penalty and attorneys' fees for each fax sent.
5 Id.; see also Id. at ¶¶ 18, 19 (alleging that Rothstein omitted to
6 inform plaintiff that he was selling services which were illegal
7 under the TCPA and which would subject plaintiff to civil liability
8 and that if plaintiff knew that the blast fax services were
9 illegal, it would not have purchased them).

10 Following the resolution of defendants' motion to dismiss for
11 failure to state a claim, each defendant filed an Answer. Maynard
12 and Adams are both represented by the same counsel and though they
13 filed separate Answers, they assert the identical thirteen
14 affirmative defenses. Thus, I discuss them jointly.

15 I. Affirmative Defenses #s 1 - 4

16 In these affirmative defenses, Maynard and Adams raise various
17 constitutional challenges to the TCPA. Plaintiff contends they
18 should be stricken because this is a RICO case, not a TCPA case,
19 and because whether the TCPA is declared unconstitutional in this
20 District has no bearing on TCPA claims against plaintiff in other
21 jurisdictions. Plaintiff also notes that the unconstitutionality
22 of the TCPA is not relevant to the damages plaintiff has already
23 paid to settle the TCPA lawsuits brought against it.

24 Defendants contend that given the nature of plaintiff's claims
25 in this case, which are based on an allegation that defendants
26 conspired to fail to inform its clients regarding the illegality of
27 its services under the TCPA, the constitutionality of the TCPA goes
28 to the heart of the claims. Plaintiff concedes that defendants'

1 argument has potential application to any future lawsuits against
2 plaintiff which are at issue in plaintiff's declaratory judgment
3 claim. Plaintiff contends that any ruling on the TCPA's
4 constitutionality in that context should be deferred until an
5 actual TCPA case is brought against plaintiff.

6 I reject plaintiff's argument. Plaintiff's concession that
7 the constitutionality of the TCPA could be relevant to the
8 declaratory judgment claim is enough to conclude that striking
9 these four affirmative defenses would be inappropriate. I
10 recommend that the motion as to affirmative defenses 1 - 4 be
11 denied.

12 II. Affirmative Defenses #s 5, 7, 8, 11, 12

13 These affirmative defenses raise the following issues:
14 unclean hands (fifth), failure to mitigate damages (seventh),
15 waiver and estoppel (eighth), assumption of risk (eleventh), and
16 release (twelfth). Plaintiff moves to strike all as being
17 inadequate "barebones" legal assertions which do not satisfy
18 Federal Rule of Civil Procedure 8(b). Plaintiff contends the
19 pleadings inadequately inform it as to the assertions against it.

20 In response, defendants contend that a "terms of use" document
21 given to plaintiff in discovery provides the appropriate context
22 for these affirmative defenses. I recommend that plaintiff's
23 motion as to these affirmative defenses be granted, but that
24 defendants be given leave to amend and replead them to include
25 sufficient facts to explain the nature of the defense.

26 III. Affirmative Defenses #s 6 and 10

27 The sixth affirmative defense asserts failure to state a claim
28 and the tenth asserts the lack of personal jurisdiction. Plaintiff

1 moves to strike these as having already been adjudicated in
2 plaintiff's favor. Although defendants might have intended to rely
3 on a previously unadjudicated basis for its failure to state a
4 claim affirmative defense, defendants did not articulate one in
5 response to this motion. Thus, I agree with plaintiff that the
6 failure to state a claim affirmative defense has been decided
7 contrary to these defendants and that affirmative defense should be
8 stricken.

9 As to the lack of personal jurisdiction, defendants note that
10 Judge Gettleman in the Northern District of Illinois decided the
11 personal jurisdiction issue on the basis of written submissions and
12 resolved any conflicts in the pleadings and affidavits in
13 plaintiff's favor. Flag Co. v. Maynard, 376 F. Supp. 2d 849. 852-
14 53 (N.D. Ill. 2005). When determining jurisdiction in this
15 fashion, the plaintiff is required to prove only a prima facie case
16 of jurisdictional facts. E.g., Data Disc, Inc. v. Systems Tech.
17 Assocs., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977); see also Butler
18 v. Adoption Media, LLC, No. 04-CV-0135, 2005 WL 1513142, at *3-4
19 (N.D. Cal. June 21, 2005) (when court relies on written submissions
20 rather than holding a full evidentiary hearing, the party asserting
21 jurisdiction need only make a prima facie case that personal
22 jurisdiction exists).

23 When the court denies a motion to dismiss for lack of personal
24 jurisdiction based on the prima facie case presented by the
25 plaintiff, the case proceeds to trial without a waiver of the
26 jurisdictional challenge and the defendant may later contest the
27 plaintiff's prima facie showing. Butler, 2005 WL 1513142, at *3-4.
28 The plaintiff still bears the burden of proof on personal

1 jurisdiction at the time of trial. Lake v. Lake, 817 F.2d 1416,
2 1450 (9th Cir. 1987); Data Disc, 557 F.2d at 1285.

3 Thus, the issue of personal jurisdiction remains relevant in
4 this case because defendants may still challenge this Court's
5 jurisdiction over them.² I recommend that the motion to strike the
6 tenth affirmative defense be denied.

7 IV. Affirmative Defense #9

8 This affirmative defense asserts that plaintiff's claims are
9 barred by the statute of limitations. Plaintiff argues that the
10 RICO statute of limitations is four years and because this case was
11 filed within that time period, the affirmative defense is
12 frivolous. Defendants contend that the issue is relevant to the
13 declaratory judgment claim which seeks damages for future
14 liabilities. I agree with defendants that the defense should not
15 be stricken.

16 V. Affirmative Defense #13

17 This affirmative defense asserts that plaintiff's claims are
18 barred because defendants did not have a high degree of involvement
19 in the transmission of any faxes for or on behalf of plaintiff.
20 Plaintiff contends the defense must be stricken because the "high
21 degree of involvement" standard is relevant to a TCPA claim, not a
22 RICO claim. I agree with plaintiff and recommend that the defense
23 be stricken.

24
25 ² I note, however, that should defendants choose to
26 challenge the prima facie case of jurisdiction, I will not
27 conduct a separate evidentiary hearing on the issue but will
28 require the issue to be addressed at the trial on the merits. At
that time, the parties can address the issue of whether
resolution of disputed facts relevant to the jurisdiction
analysis should be handled by the jury.

CONCLUSION

I recommend that plaintiff's motion to strike (#117), be granted in part and denied in part.

SCHEDULING ORDER

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due July 14, 2006. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date.

If objections are filed, a response to the objections is due July 28, 2006, and the review of the Findings and Recommendation will go under advisement on that date.

IT IS SO ORDERED.

Dated this 29th day of June, 2006.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge